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# IN THE
# COURT OF APPEALS OF INDIANA

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| DWAYNE L. BEAR, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 41A01-0604-CR-164 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE JOHNSON SUPERIOR COURT
The Honorable Cynthia E. Emkes, Judge
Cause No. 41D02-0411-FD-276

**October 5, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Judge**

Appellant-defendant Dwayne Bear appeals his conviction and three-year sentence for Theft,[1] a class D felony. Specifically, Bear contends that (1) he was not given an opportunity to rebut the claim that he knowingly failed to appear for trial, (2) the trial court erred in finding and balancing aggravating and mitigating factors, and (3) the sentence imposed was inappropriate in light of the nature of the offense and his character. Concluding that Bear was properly tried in absentia and properly sentenced, we affirm the judgment of the trial court.

## FACTS

On October 16, 2004, at approximately 2:38 a.m., Sergeant Brian Blackwell of the Greenwood Police Department was patrolling Emerson Avenue in Johnson County when he observed a small pickup truck exiting the parking lot of a local business. As Sergeant Blackwell began to follow the truck, he noticed that a white van in the nearby parking lot was missing a rear door. Sergeant Blackwell pulled behind the pickup truck and saw that a white van door was lying on top of other objects in the rear of the truck. Sergeant Blackwell initiated a traffic stop and spoke with Bear, who was alone and driving the vehicle. Bear told Sergeant Blackwell that he had taken the van door. Sergeant Blackwell escorted Bear back to the van and asked him to reattach the door if possible. Bear told Sergeant Blackwell it would be easy and reattached the door in less than one minute. Sergeant Blackwell then noticed that the driver's side window of the van had been "smashed out." Tr. p. 36. Sergeant Blackwell subsequently contacted the van's owner, Michael Bishop, who told him that he

[1] Ind. Code § 35-43-4-2(a).

had not given Bear, or anyone else, permission to take the van door.

On November 10, 2004, the State charged Bear with theft, a class D felony. An initial hearing was held on December 6, 2004, and a jury trial was scheduled for June 7, 2005. Bear subsequently posted bond on March 11, 2005. Bear filed a motion for a continuance on June 1, 2005, and the trial court granted the motion and reset the trial for November 15, 2005. Bear failed to appear for a pretrial hearing on August 4, 2005, and a warrant was issued for his arrest. Bear was arrested pursuant to the warrant, and he appeared at a hearing on August 25, 2005, where the trial court again informed Bear that the jury trial would be held as scheduled on November 15, 2005. Bear posted bond on September 12, 2005. Bear appeared at a pretrial hearing on October 20, 2005, and the trial court reiterated that the jury trial was set for November 15, 2005.

On November 15, 2005, Bear failed to appear for his jury trial. Bear's counsel acknowledged that Bear was aware of the trial date. Counsel requested a continuance and the State objected. The trial court noted that it had advised Bear of his trial date on three separate occasions and denied the continuance request. A jury trial was held and Bear was found guilty as charged. The trial court issued a warrant for Bear's arrest on November 17, 2005. Bear was arrested pursuant to the warrant on January 13, 2006. Bear appeared at his sentencing hearing on February 2, 2006, and the trial court sentenced him to three years of imprisonment with one year of the sentence suspended. Bear now appeals.

## DISCUSSION AND DECISION

### I. Trial in Absentia

Bear first argues that the trial court erred by trying him in absentia. Specifically, Bear argues that he was not afforded an opportunity to rebut the presumption that he knowingly and intentionally waived his right to be present for the trial.

Generally, a criminal defendant has a right to be present at all stages of the trial. Soliz v. State, 832 N.E.2d 1022, 1029 (Ind. Ct. App. 2005). But a defendant may waive this right and be tried in absentia if the trial court determines that the defendant knowingly and voluntarily waived his right to be present. Id. The trial court may presume that a defendant voluntarily, knowingly, and intelligently waived his right to be present and try the defendant in absentia upon a showing that the defendant knew the scheduled trial date but failed to appear. Ellis v. State, 525 N.E.2d 610, 611-12 (Ind. Ct. App. 1987).

A defendant who has been tried in absentia must later be given the opportunity to explain his absence and thereby rebut the presumption of waiver. Diaz v. State, 775 N.E.2d 1212, 1216-17 (Ind. Ct. App. 2002). This does not require a sua sponte inquiry from the court, but the defendant cannot be prevented from explaining his absence. Id. at 1217. On direct appeal, we consider the entire record to determine whether the defendant voluntarily, knowingly, and intelligently waived his right to be present at trial. Reel v. State, 567 N.E.2d 845, 846 (Ind. Ct. App. 1991). A defendant's explanation of his absence is a part of the evidence available to a reviewing court in determining whether it was error to try him in absentia. Fennell v. State, 492 N.E.2d 297, 299 (Ind. 1986).

Bear does not argue on appeal that he unknowingly[2] waived his right to be present at trial; instead, he argues that he was not afforded an opportunity to rebut the presumption that his failure to appear was knowing and intentional. Bear complains that he was not given a separate hearing to explain his trial absence and, instead, only received an opportunity to clarify his absence at his sentencing hearing. While a defendant who has been tried in absentia must be given an opportunity to explain his absence and rebut the presumption that he waived his right to be present, the trial court does not have to conduct a sua sponte inquiry into the defendant's failure to appear at trial. Diaz, 775 N.E.2d at 1217. Instead, the trial court must merely permit a defendant to explain his absence if the defendant so chooses. Id. Here, Bear's trial counsel did not request a separate hearing for the court to evaluate Bear's absence and the trial court was not obligated to hold such a hearing sua sponte. Therefore, it was not error for the trial court to fail to hold a separate hearing on the issue.

Moreover, Bear had an opportunity to explain his absence on direct examination at his sentencing hearing:

> Q: Explain to the Judge why you did not appear for the trial.
>
> A: My mother (INAUDIBLE) got very sick and she's eighty five years old and the doctor said that there was, may be a chance that when she had to have the surgery she may not make it so I had to go there to see her just one more time.
>
> Q: So knowing this case was pending you took off and went down there and [. . . .]

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[2] The trial court concluded that Bear knew of his November 15, 2005, trial date because the court informed him of the date on June 1, August 25, and October 20, 2005. Tr. p. 2-3. Furthermore, at sentencing Bear stated that he knew "it was wrong" to fail to appear for the trial and that he did not contact his attorney because he did not think that she would be able to obtain a continuance. Sent. Tr. p. 5.

A: Yes ma'am, I know it was wrong, but, you know, it may have been the last time I seen [sic] my mother.

Q: And what I said to you was "Why in the heck didn't you call me and ask me for a continuance." You didn't think I'd be able to get a continuance?

A: Exactly.

Sent. Tr. p. 5. Unlike Diaz, the case to which Bear directs us, Bear was given a full opportunity to explain his absence without interruption from the court. Cf. Diaz, 775 N.E.2d at 1217 (holding that the trial court erred by preventing defendant from explaining his trial absence at his warrant rearrest hearing). We conclude that the trial court properly afforded Bear an opportunity to rebut the presumption that he did not make a knowing and intelligent waiver of his right to be present at trial.

## II. Sentence Review

Bear argues that the trial court erred in finding and balancing aggravating and mitigating factors and that his three-year sentence was inappropriate in light of the nature of the offense and his character.

### A. Sentencing Statement

In addressing Bear's contention that he was improperly sentenced, we initially observe that sentencing decisions are within the sound discretion of the trial court. Jones v. State, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003). Sentencing decisions are given great deference on appeal and will only be reversed for an abuse of discretion. Beck v. State, 790 N.E.2d 520, 522 (Ind. Ct. App. 2003). When the trial court imposes a sentence other than the

presumptive sentence,[3] we will examine the record to insure that the trial court explained its reasons for selecting the sentence it imposed. Kelly v. State, 719 N.E.2d 391, 395 (Ind. 1999). The trial court's statement of reasons must include the following components: (1) identification of all significant aggravating and mitigating circumstances; (2) the specific facts and reasons that led the court to find the existence of each such circumstance; and (3) an articulation demonstrating that the mitigating and aggravating circumstances were evaluated and balanced in determining the sentence. Id.

We also note that a single aggravating factor may be sufficient to support an enhanced sentence. Powell v. State, 769 N.E.2d 1128, 1135 (Ind. 2002). A defendant's criminal history alone may be a sufficient basis for imposing an enhanced sentence when considering the gravity, nature, and number of prior offenses as they relate to the current offense. Morgan v. State, 829 N.E.2d 12, 15 (Ind. 2005). Additionally, the determination of the existence of, and the weight to be given to, mitigating factors falls within the trial court's discretion. Allen v. State, 722 N.E.2d 1246, 1251 (Ind. Ct. App. 2000). A trial court is not required to give the same weight to mitigating evidence as does the defendant, nor must the

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[3] Indiana's sentencing statutes were amended by P.L. 71-2005, sec. 7, with an emergency effective date of April 25, 2005, to alter "presumptive" sentences to "advisory" sentences. In Weaver v. State, 845 N.E.2d 1066 (Ind. Ct. App. 2006), a panel of this court determined that the proper sentencing statutes to be applied were those in effect when the defendant had been convicted of the offense, rather than the amended versions that became effective after the conviction but before sentencing. Specifically, the Weaver court observed "Application of the amended statutes to persons convicted before the amendments took effect would, we believe, violate the constitutional protections against ex post facto laws." Id. at 1070. Inasmuch as Bear committed the instant offense on October 16, 2004—approximately six months before the effective date of P.L. 71-2005—the rule advanced in Weaver applies and we will review the propriety of Bear's sentence under the former sentencing statute. In accordance with that version, "A person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 1/2) years, with not more than one and one-

court accept the defendant's assertions as to what constitutes a mitigating circumstance. Id. at 1252. In other words, the trial court need not consider alleged mitigating factors that are highly disputable in nature, weight, or significance. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003).

1. Mitigating Factors

Bear argues that the trial court failed to find two significant mitigating factors at sentencing: (1) that he made restitution to the victim of the crime and (2) that his crime neither caused nor threatened serious harm to persons or property. Initially, we note that Bear did not claim either of these to be mitigating factors at sentencing. A trial court does not abuse its discretion by failing to consider a factor that was never raised at sentencing. Dumas v. State, 803 N.E.2d 1113, 1124 (Ind. 2004). Furthermore, a mitigating circumstance that was not raised at sentencing is not available on appeal. Lemos v. State, 746 N.E.2d 972, 976 (Ind. 2001). Therefore, Bear has waived these arguments on appeal.

Waiver notwithstanding, we note that it is within the trial court's discretion to determine both the existence and weight of significant mitigating circumstances. Allen, 722 N.E.2d at 1251. An allegation that the trial court failed to identify a particular mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. Bear has failed to establish that the trial court overlooked any significant mitigating factors. The fact that Bear claims he made restitution to the victim by reattaching

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half (1 1/2) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating

the stolen door to the van does not change the fact that Bear stole the door. Bear only reattached the door at Sergeant Blackwell's request after he had been apprehended. Therefore, it was not an abuse of discretion for the trial court not to find this "restitution" a significant mitigating factor.

Turning to Bear's suggestion that the lack of violence during his theft should be a significant mitigating factor, we note that Bear was convicted of a crime that does not require violence as an element for conviction. A trial court does not abuse its discretion by not finding a defendant's lack of violence a mitigating factor if violence is not an element of the crime. See, e.g., Banks v. State, 841 N.E.2d 654, 659 (Ind. Ct. App. 2006), trans. denied (holding that it is not an abuse of discretion for trial court to refuse to consider defendant's lack of violence as a mitigating circumstance when sentencing defendant for operating a vehicle with driving privileges forfeited for life because violence is not an element of the crime). Inasmuch as violence is not an element of the crime of theft, we conclude that the trial court did not abuse its discretion by not finding Bear's lack of violence a significant mitigating circumstance in this instance.[4]

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circumstances." Ind. Code § 35-50-2-7.

[4] Bear also argues that the trial court should have articulated the balance of the aggravators and mitigators at sentencing. However, the trial court did not find any mitigators at sentencing, and in light of our finding that it was not an abuse of discretion for the court not to identify Bear's proposed mitigators, we find that it was not error for the court not to articulate the balance at sentencing.

2. Aggravating Factors

Bear also argues that it was improper for the trial court to consider both his prior criminal history and his likelihood to re-offend as aggravating circumstances. At sentencing, the trial court specifically found Bear's extensive criminal history, which spanned over two decades, to be an aggravating factor. The trial court also stated that it believed that Bear was "someone who's likely to commit another crime, if not sentenced to a sentence that impresses upon [him] how serious this offense was, as well as how seriously the Court is going to take conviction likes [sic] this based on [his] prior record . . . ." Sent. Tr. p. 23. While the trial court did not explicitly characterize Bear's likelihood to re-offend to be an aggravating circumstance, such an allegedly improper aggravator[5] is irrelevant to these circumstances given Bear's lengthy criminal history.

A single aggravating factor may be sufficient to support an enhanced sentence. Powell v. State, 769 N.E.2d 1128, 1135 (Ind. 2002). Specifically, a defendant's criminal history alone may be a sufficient basis for imposing an enhanced sentence when considering the gravity, nature, and number of prior offenses as they relate to the current offense. Morgan, 829 N.E.2d at 15. Bear admits that his "criminal history is lengthy." Sent. Tr. p. 18. His prior convictions included possession of marijuana, possession of drug paraphernalia, criminal mischief, two convictions for felony theft, two convictions for felony

[5] In Neff v. State, our Supreme Court determined that judicial statements characterized as aggravating circumstances, including a defendant's risk to re-offend, are not always "facts" for Blakely purposes. 849 N.E.2d 556, 560 (Ind. 2006). Instead, these statements merely describe the "moral and penal weight of actual facts." Id. However, such statements may not stand as separate aggravators when the factual basis that supports them also serves as another aggravator. Id. at 559.

burglary, and possession of cocaine. Sent. Tr. p. 7, 12-15. Bear's criminal history, especially his two felony burglary convictions and two felony theft convictions, directly relate to his current theft offense. Therefore, based on Bear's extensive criminal history, the trial court did not abuse its discretion by imposing a three-year sentence.

B. Appropriateness of Sentence

Finally, Bear argues that his sentence was inappropriate in light of the nature of the offense and his character. Specifically, Bear contends that he should not have received the maximum sentence for his crime because he is not one of the worst offenders.

Our court has the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). However, sentence review under Appellate Rule 7(B) is very deferential to the trial court's decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court, Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Bear claims that he merely stole the door from an abandoned van left in a parking lot. However, the record shows that the true owner of the van stored the vehicle in the parking lot because his business was located in an adjoining store. Bishop did not know Bear and had not given Bear permission to take the door. In our view, these circumstances establish a clear disregard for Bishop's property interest and the law.

Bear also argues that he does not deserve the maximum three-year sentence for a class D felony because of his character. However, Bear's twenty-year criminal history exposes the true nature of his character. At sentencing, Bear confirmed that his prior criminal history included convictions for drug-related offenses and numerous felonies against property. When considering Bear's character in light of his abundant encounters with the law, we conclude that the three-year sentence is not inappropriate.

The judgment of the trial court is affirmed.

VAIDIK, J., and CRONE, J., concur.